Filed 8/12/19 P. v. Morales CA5

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

DAVID HANS MORALES,

Defendant and Appellant.

F076273

(Super. Ct. No. F16905584)

OPINION

THE COURT[*]

APPEAL from a judgment of the Superior Court of Fresno County. Arlan L. Harrell, Judge.

Stephen M. Hinkle, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Julie A. Hokans and Kenneth N. Sokoler, Deputy Attorneys General, for Plaintiff and Respondent.

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[*] Before Levy, Acting P.J., Smith, J. and Meehan, J.

PROCEDURAL HISTORY

On four separate occasions, defendant David Hans Morales entered a store, lifted his shirt to show the cashier the gun tucked in his waistband and demanded the money in the cash register. He succeeded in leaving with the money on three of those occasions. He was subsequently charged with and convicted by jury of four counts of robbery in the second degree (Pen. Code, § 211)[1] (counts 1–4) and one count of attempted robbery in the second degree (§§ 664/211) (count 5).[2] In a bifurcated proceeding, the jury also found true that defendant suffered two prior serious or violent felony convictions within the meaning of the "Three Strikes" law. (§§ 667, subds. (b)–(i), 1170.12, subds. (a)–(d).)

Defendant was sentenced to an indeterminate term of 100 years to life in prison plus a determinate term of 40 years, as follows. On counts 1, 3, 4 and 5, the court imposed, for each count, a term of 25 years to life pursuant to the Three Strikes law, plus two additional five-year terms for the prior serious felony conviction enhancements. (§ 667, subd. (a)(1).) On count 2, the court exercised its discretion, pursuant to *People v. Garcia* (1999) 20 Cal.4th 490, 503–504, to strike the prior felony conviction allegations and it sentenced him to the upper term of five years, plus an additional 10 years for the two prior serious felony conviction enhancements, for a total term of 15 years, concurrent with the term imposed on count 1.

On appeal, defendant claims that as to counts 2 and 5, the trial court erred in refusing his request to instruct the jury on theft and erred in failing to instruct the jury sua sponte on theft and attempted theft as lesser included offenses of robbery and attempted robbery. In supplemental briefing, defendant requests remand so that the trial court may exercise its discretion to strike the prior serious felony conviction enhancements in light

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[1] All further statutory references are to the Penal Code.

[2] The gun used in the crimes was a handgun replica pellet gun and the jury found the sentence enhancement allegations for personal use of a deadly or dangerous weapon not true. (§ 12022, subd. (b)(1).)

of Senate Bill No. 1393 (2017-2018 Reg. Sess.) ch. 1013, §§ 1–2 (Senate Bill No. 1393 or Sen. Bill No. 1393), effective January 1, 2019. The People respond that the trial court did not commit instructional error because instructions on theft and attempted theft were not supported by substantial evidence and, in any event, the failure to instruct was harmless. They agree, however, that the matter should be remanded under Senate Bill No. 1393.

We reject defendant's instructional error claim, but we agree with the parties regarding Senate Bill No. 1393 and we remand the matter to allow the trial court to exercise its discretion in the first instance with respect to whether to strike the prior serious felony conviction enhancements. Except as modified, the judgment is affirmed.

FACTUAL SUMMARY

I. Counts 1 and 2

On August 30, 2016, at approximately 11:00 p.m., N.N. and A. were working at an Arco AM/PM store in Fresno. N.N. was new and working at the cash register. A., who had been there longer, was working in the coffee area. Defendant entered the store. No other customers were present and as N.N. went to help him, he lifted his shirt and displayed a gun in his waistband. He instructed N.N. not to tell anyone and to give him all the money quickly. N.N., feeling panicky and scared, opened the register and began giving defendant the money inside. During this time, she also called out for A., who then came over.

N.N. told A. defendant wanted the money, and defendant lifted his shirt and showed A. the gun in his waistband. A. pushed N.N. aside and said if defendant wanted the money, give it to him. A. put the money on the counter and defendant told them to move back, after which he took the money and left.

II. Count 3

On September 2, 2016, at approximately 11:30 p.m., defendant entered a second Arco AM/PM store in Fresno. He asked F., who was working there, for gum. There were a few customers present and, after they left, defendant approached the register. As F. scanned his gum and opened the register, he lifted his shirt up and displayed a gun in his waistband. F.'s "heart dropped" and she felt really nervous. Defendant instructed F. not to do anything and to give him all the money in the register. She gave him the money and he walked out.

III. Count 4

At approximately 8:00 p.m. on September 4, 2016, M. was working at a Family Dollar store in Fresno. Defendant brought a pack of gum up to her register. She rang it up and asked if he needed a bag. Defendant then lifted his shirt and she saw a gun tucked in his pants. He said he did not want to hurt her, and told her not to do anything and to give him the money. Scared, she gave him all the money and he walked out.

IV. Count 5

Finally, on September 4, 2016, at approximately 10:30 p.m., defendant entered a Valero/Shop-N-Go in Clovis, where N.V. was working. There were several other customers in the store. Defendant let one person go ahead of him and then waited for the others to leave, after which he approached to buy gum. As he handed N.V. $1 for the gum, he lifted his shirt and displayed a gun in his waistband. He asked N.V. if she knew what time it was. She said no and he repeated the question a few times. She said no each time. He then asked for the money in the register. N.V. told him no and she said she had pushed the alarm button. Defendant ran out the door.

DISCUSSION

I. Instructional Error

Defendant concedes his convictions are supported by substantial evidence, but as to count 2 (robbery of A.) and count 5 (attempted robbery of N.V.), he argues the trial court erred when it refused his request to instruct the jury on theft as a lesser included offense of robbery, pursuant to CALCRIM. No. 1800. He also argues the court had a sua sponte duty to instruct the jury on theft and attempted thefts as lesser included offenses of count 2 and count 5, respectively.

A. Standard of Review

"'"[A] defendant has a constitutional right to have the jury determine every material issue presented by the evidence …." [Citations.]' [Citation.] 'To protect this right and the broader interest of safeguarding the jury's function of ascertaining the truth, a trial court must instruct on lesser included offenses, even in the absence of a request, whenever there is substantial evidence raising a question as to whether all of the elements of the charged offense are present.' [Citation.] Conversely, even on request, a trial judge has no duty to instruct on any lesser offense *unless* there is substantial evidence to support such instruction."'" (*People v. Cunningham* (2001) 25 Cal.4th 926, 1007–1008; accord, *People v. Souza* (2012) 54 Cal.4th 90, 116.)

"[S]ubstantial evidence of the lesser included offense … is … 'evidence from which a rational trier of fact could find beyond a reasonable doubt' that the defendant committed the lesser offense. [Citation.] Speculation is insufficient to require the giving of an instruction on a lesser included offense. [Citations.] In addition, a lesser included instruction need not be given when there is no evidence that the offense is less than that charged." (*People v. Mendoza* (2000) 24 Cal.4th 130, 174; accord, *People v. Smith* (2018) 4 Cal.5th 1134, 1163; *People v. Redd* (2010) 48 Cal.4th 691, 732–733.)

A trial court's failure to instruct sua sponte on a lesser included offense is reviewed de novo. (*People v. Trujeque* (2015) 61 Cal.4th 227, 271; *People v. Licas* (2007) 41 Cal.4th 362, 366.)

B. Analysis

1. No Error

"Robbery is 'the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear.'" (*People v. Williams* (2013) 57 Cal.4th 776, 786, quoting § 211.) Theft, which does not include the additional element of force or fear, is a lesser included offense of robbery. (*People v. Friend* (2009) 47 Cal.4th 1, 51; *People v. Abilez* (2007) 41 Cal.4th 472, 513.)

Relying on *People v. Brew* (1991) 2 Cal.App.4th 99 (*Brew*), defendant contends that he was entitled to instructions on theft and attempted theft given that neither A. nor N.V. testified she was afraid.[3] In *Brew*, after the drug store cashier rang up an item for the defendant and opened the cash drawer, he entered the register area, lifted the register drawer and removed the money. (*Id.* at pp. 102–103.) The cashier testified she stepped back from the register because she was scared, but the defendant did not have a weapon, did not say anything and did not touch her. (*Id.* at pp. 103–104.) The assistant manager, who had been watching the defendant, ran over and confronted him. (*Id.* at pp. 102–103.) The assistant manager "felt a 'force up against'" his head and he fell but grabbed onto the defendant's leg. (*Id.* at p. 103.) The defendant then managed to free himself and flee with the money. (*Ibid.*)

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3 This case did not involve the use of force. (*People v. Mullins* (2018) 19 Cal.App.5th 594, 604 ["To establish force for the purpose of a robbery conviction, 'something more is required than just that quantum of force which is necessary to accomplish the mere seizing of the property.'"].)

The Court of Appeal rejected the defendant's claim that his robbery conviction as to the cashier was unsupported by substantial evidence, and it rejected his claim that as to his robbery conviction relating to the assistant manager, the trial court erred in failing to instruct the jury on the lesser included offense of theft. (*Brew*, *supra*, 2 Cal.App.4th at pp. 104–105.) However, as to the cashier, the court concluded that the evidence arguably supported a finding that the crime was committed without fear or intimidation and, therefore, it was error not to instruct on the lesser included offense of theft. (*Id.* at p. 105.) Assuming without deciding that *Brew* would be decided the same way today, we find it inapt in any event because in this case, defendant lifted his shirt to display a gun, a distinction we find material.[4]

"'The element of fear for purposes of robbery is satisfied when there is sufficient fear to cause the victim to comply with the unlawful demand for his property.' [Citations.] It is not necessary that there be direct proof of fear; fear may be inferred from the circumstances in which the property is taken. [Citation.] [¶] If there is evidence from which fear may be inferred, the victim need not explicitly testify that he or she was afraid. [Citations.] Moreover, the jury may infer fear '"from the circumstances despite even superficially contrary testimony of the victim."'" (*People v. Morehead* (2011) 191 Cal.App.4th 765, 774–775; accord, *People v. Mullins*, *supra*, 19 Cal.App.5th at p. 604.) "Intimidation of the victim equates with fear. [Citation.] An unlawful

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4 The *Brew* court also rejected the reasonable probability standard of error articulated in *People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*) and relied on *People v. Ramkeesoon* (1985) 39 Cal.3d 346, 351–352, for the proposition that "'[a]n error in failing to instruct on lesser included offenses requires reversal unless it can be determined that the factual question posed by the omitted instruction was necessarily resolved adversely to the defendant under other, properly given instructions.'" (*Brew*, *supra*, 2 Cal.App.4th at p. 105.) Applying this more stringent standard, discussed in *People v. Sedeno* (1974) 10 Cal.3d 703, 720–721 and known as the *Sedeno* standard, the court found the instructional error prejudicial (*Brew*, *supra*, at p. 106). However, nearly a decade after *Brew*, the California Supreme Court concluded that the *Watson* standard applies to the failure to instruct on lesser included offenses and it overruled the *Sedeno* standard in that context. (*People v. Breverman* (1998) 19 Cal.4th 142, 165; accord, *People v. Gonzalez* (2018) 5 Cal.5th 186, 191.)

demand can convey an implied threat of harm for failure to comply, thus supporting an inference of the requisite fear." (*People v. Morehead*, *supra*, at p. 775; accord, *People v. Mullins*, *supra*, at p. 604.)

Defendant focuses on the lack of testimony by A. and N.V. that they were afraid, but defendant displayed a gun to facilitate the robbery of A. and the attempted robbery of N.V., and he concedes that during his interrogation, he admitted it bothered him that he scared the victims of his crimes. Critically, as the trial court recognized, there was no substantial evidence to support a theory that the victims would have complied with the demand to hand over money from the cash register but for the display of a gun to intimidate them or cause them fear. (See *People v. Montalvo* (2019) 36 Cal.App.5th 597, 612–613 [prosecution failed to prove fear element where victim did not testify he was afraid and instead turned over his property believing that the defendant was an undercover police officer].) Accordingly, in the absence of substantial evidence that defendant committed merely theft or attempted theft, we reject his claim that the trial court erred in refusing to instruct the jury on those lesser included offenses.

2. No Prejudice

Furthermore, even if we assume error for the sake of argument, there is no prejudice. Notwithstanding that A. and N.V. did not testify expressly that they were intimidated or afraid, given that defendant facilitated the robbery and attempted robbery by lifting his shirt to display a gun in his waistband, we conclude it is "not reasonably probable" that the jury would have reached a more favorable result even if it had been instructed on theft and attempted theft. (*People v. Friend*, *supra*, 47 Cal.4th at pp. 42–43.)

II. Prior Serious Felony Enhancements

A. Background

At the time of sentencing, the trial court was required to impose the five-year enhancements under section 667, former subdivision (a)(1), based on defendant's two prior serious felony convictions for robbery. Effective January 1, 2019, section 1385 was amended to permit a trial court, in the furtherance of justice, to strike or dismiss the five-year enhancement under subdivision (a)(1) of section 667. (Sen. Bill No. 1393.) The parties agree that the amendments to sections 667 and 1385 apply retroactively in this case and they also agree that remand for resentencing in light of Senate Bill No. 1393 is required. We concur with the parties that it is appropriate to remand this matter. (*People v. Zamora* (2019) 35 Cal.App.5th 200, 207–208; *People v. Garcia* (2018) 28 Cal.App.5th 961, 971–973; *People v. McDaniels* (2018) 22 Cal.App.5th 420, 424–428 [analyzing analogous amendment to firearm enhancement statute pursuant to Sen. Bill No. 620].)

The trial court in this case exercised its discretion to strike defendant's prior felony convictions as to count 2 because, although count 1 and count 2 involved different victims, the crimes occurred at the same location and were close in time. (*People v. Garcia*, *supra*, 20 Cal.4th at pp. 503–504.) However, at the time, the court was required to impose the prior conviction enhancements. (§§ 667, former subd. (a)(1), 1385, former subd. (b).) Defendant is entitled to be sentenced in the exercise of informed discretion and, therefore, remand is appropriate so that the trial court may exercise its discretion in the first instance in light of the amendments to sections 667 and 1385. (*People v. Gutierrez* (2014) 58 Cal.4th 1354, 1391; *People v. Garcia*, *supra*, 28 Cal.App.5th at p. 973, fn. 3; *People v. McDaniels*, *supra*, 22 Cal.App.5th at pp. 427–428.) We express no opinion on how the trial court should exercise its discretion on remand.

DISPOSITION

The matter is remanded to the trial court to exercise its discretion under sections 667, subdivision (a), and 1385, subdivision (b), as amended by Senate Bill No. 1393 and, if appropriate following exercise of that discretion, to resentence defendant accordingly. The judgment is otherwise affirmed.